(10)

No. 90-1038

IN THE

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE,

Petitioner,

v.

LIGGETT GROUP, INC.,
PHILIP MORRIS, INC.,
and LOEW'S THEATRES, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America [ATLA] respectfully submits this brief as amicus curiae in support of Petitioner in this case. Letters of consent by the parties to the filing of this brief have been filed with the clerk.

ATLA is a voluntary bar association of about 65,000 trial attorneys from every State and many foreign countries. ATLA members primarily represent victims: Those who have suffered personal injury, infringement of their civil rights, property damage, or economic loss. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, elements of American business and industry who may be defendants in state tort actions are seeking refuge in the doctrine of federal preemption. There are circumstances in which federal displacement of state tort remedies may be justified. In other instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided for meaningful alternative regulation and remedies. Such a regulatory gap represents a failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury. The preservation of our system of federalism demands that courts foreclose state remedies only upon clear and unambiguous evidence that Congress so intends.

SUMMARY OF ARGUMENT

The Supremacy Clause permits Congress to preempt state law. This Court has clearly enunciated and consistently applied a set of principles to give effect to the preemptive purpose of Congress. At the same time, due regard for healthy federalism has led the Court to prescribe a presumption against federal preemption of state law. This presumption is especially strong when Congress legislates in an area traditionally occupied by the States. And the presumption is stronger yet where Congress is claimed to have supplanted traditional state tort remedies without providing an alternative avenue for redress.

In this case, the lower court erred in departing from these accepted principles and drastically expanding the scope of federal preemption. The lower court properly determined that the Federal Cigarette Labeling and Advertising Act did not expressly preempt state products liability law and did not occupy the field. The lower court erred, however, in ignoring the strong presumption against preemption and finding that tort awards actually conflicted with the federal statute.

Determination that a state law that stands as an "obstacle" to the accomplishment of the objectives of Congress is not an appropriate standard for preemption of state tort law. Moreover, jury damage awards are not the equivalent of state regulations that might conflict with federal regulation. Congress itself has made it clear that tort actions and federal regulation can coexist in the same regulatory scheme.

ARGUMENT

I. COURTS MAY NOT SET ASIDE STATE TORT LAW REMEDIES TRADITIONALLY AVAILABLE TO INJURED VICTIMS AS PREEMPTED BY FEDERAL LAW UNLESS CONGRESS HAS CLEARLY AND UNAMBIGUOUSLY SO INTENDED.

A. This Court has Enunciated Clear Principles To Resolve Questions of Federal Preemption.

This case need not have come before this Court. It is true that the issue presented -- the tension between federal law and state law -- is fundamental in our system of federalism. It is also true that the balance is sometimes delicate. Striking that balance, however, is the responsibility of Congress. This Court has clearly enunciated and

consistently applied the principles under which questions of preemption may be resolved, giving full effect to the Supremacy Clause and to the demands of federalism.

All the tools which the lower court needed to properly resolve the issues in this action had been set forth by this Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). However, the Third Circuit, giving only scant recognition to *Silkwood*, struck out on its own course. The result was, in the words of Prof. Lawrence Tribe, "a major departure from established principles of federalism," threatening the rights which states have afforded citizens in a wide variety of situations touched by a federal regulatory presence. L. Tribe, *Anti-Cigarette Suits, Federalism With Smoke and Mirrors,* The Nation, June 7, 1986, at 788. At that point, it became necessary for this Court to correct this error.

Plaintiff asserts a products liability action, seeking compensation for the smoking-related death of Rose Cipollone. Protecting consumers from hazardous products, including products which are dangerous in the absence of adequate warnings, and affording fair compensation to those who are injured by them, is a traditionally strong state interest. *See Freund v. Cellofilm Properties. Inc.,* 87 N.J. 229, 238, 432 A.2d 925 (N.J. 1981)(policy basis for strict liability for failure to warn); *Feldman v. Lederle Laboratories,* 97 N.J. 429, 461, 479 A.2d 374 (N.J. 1984)(duty to warn); *O'Brien v. Muskin Corp.*, 94 N.J. 160, 463 A.2d 298 (1988)(strict liability represents an allocation of the risk of injuries caused by unsafe products); *Dewey v. R.J.Reynolds Tobacco Co.,* 121 N.J. 69, 91, 577 A.2d 1239 (1990)(holding that federal law does not preempt product liability actions for failure to warn of the dangers of cigarettes, emphasizing that a primary purpose of tort law is compensation of victims). These strong state interests have long been widely acknowledged. *See generally* Wade,

On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 826 (1973); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 371 (1965)(noting suits against cigarette manufacturers).

Defendants assert that Congress displaced state law and deprived injured victims of their right to seek just compensation with respect to a single product. The Federal Cigarette Labeling and Advertising Act, as amended in 1970, announces:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
> (2) commerce, and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).

Toward this end, Congress required each package of cigarettes to bear the statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).

Congress also included in the Act a preemption provision:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982).

There is no doubt that the Supremacy Clause gives Congress the power to displace state law.[1] In determining whether Congress has exercised this power, this Court has emphasized that "the purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1552 (1987).

Congress can, of course, indicate its intent to preempt state law by saying so, clearly and unambiguously, so that "the courts' task is an easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Apart from express preemption,

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[1]This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. Art. VI, cl. 2.

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

This Court has consistently announced and applied these preemption principles. *See, e.g., English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990); *California v. Federal Energy Regulatory Comm'n*, 110 S. Ct. 2024, 2033 (1990); *California v. ARC America Corp.*, 109 S. Ct. 1661, 1665 (1989); *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

B. This Court Has Established a Strong Presumption Against Preemption of State Tort Remedies.

1. Healthy Federalism Requires A Presumption that Congress Did Not Intend Preemption of State Law in Areas Traditionally Occupied By the States.

Integral to this Court's preemption doctrine is the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1977). This presumption against preemption is not merely a rule of statutory construction, but is based on "due regard for the

presuppositions of our federal system, including the principle of diffusion of power, not as a matter of doctrinaire localism, but as a promoter of democracy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)(the presumption against preemption "provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.")

Where Congress has legislated in a field which the states have traditionally occupied, the courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court has consistently reaffirmed this presumption in favor of state law in areas traditionally occupied by the states. *See English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990)(even in the highly regulated field of nuclear facilities, the Court found "no clear and manifest intent on the part of Congress . . . to preempt all state tort laws that *traditionally* have been available"); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1156 n.13 (1988); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963)(noting the legitimate interest of States in the protection "against fraud and deception in the sale of food products within their borders.")

2. This Court Has Established a Strong Presumption Against Federal Preemption of State Remedies in the Absence of An Alternative Federal Remedy.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall stated that "the very essence

of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Recognition of this basic notion has caused this Court to refuse to find preemption of state law remedies where federal law provided no alternative redress. *See United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 663-64 (1954).

As the *Silkwood* Court stated:

> This silence (of congress) takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n.7.

Other courts have followed this mandate. *See, e.g., Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988)("The presumption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedies exist.")

C. The Decision to Confer Immunity Upon an Industry is Policy Decision for Congress, Not the Courts.

It has been suggested that courts have found preemption in cigarette cases in order to protect the tobacco industry from flood of claims. *See* Ausness, *Cigarette Company Liability: Preemption, Public Policy, and*

Alternative Compensation Systems, 39 Syracuse L. Rev. 897, 903 (1988); 32 Vill. L. Rev. 875, 891 (1987).

The tobacco industry is hardly in need of such indulgence. From the mid-1950's to the present, the entire industry has never lost a trial or paid a settlement. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423 (1980). Cigarette manufacturers managed to compile this unique record without the benefit of federal preemption. Rather, success has been due to the inability of plaintiffs to overcome a variety of difficult problems of proof. *Id.* at. 1425-28; *See also* Comment, *Products Liability: Can It Kick the Smoking Habit*, 19 Akron L. Rev. 269 (1985)(discussing early wave of cigarette cases in detail).

It should be immediately apparent that, even without the protective shield conferred upon cigarette manufacturers by the Third Circuit, few smokers could be confident of prevailing in a product liability action.[2]

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[2]If a significant number of claims for smoking-related injuries would succeed, Congress could protect the industry by establishing a compensation scheme funded by cigarette taxes. Proposals have already been advanced. *E.g.*, Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085 (1990); Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423 (1980). The tobacco industry, which carries considerable clout in congressional corridors, can be counted on to ensure that the industry remains a viable, if winded, market competitor. The Third Circuit, however, should have more closely heeded this Court's advice: "The courts should not assume the role which our system assigned to Congress." *Pacific Gas & Elec. Co. v. Energy Resources Comm'n.*, 461 U.S. 190, 223 (1983).

As a result, those most affected by the extraordinarily broad view of federal preemption espoused by the lower court will not be smokers or the tobacco industry. They will be those injured by the wide array of products or services touched in some fashion by federal regulation. The Court is therefore not required to blind itself to the political realities surrounding this dispute.

Though this court recognized Congress' preemptive authority as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), over half of the federal statutes which have ever preempted state law were enacted since 1970. Moore, "Stopping the States," National Journal, July 21, 1990 at 1760 (Reporting data supplied by the Advisory Commission on Intergovernmental Relations).

The demand by business and industry for federal preemption is often simply an attempt to avoid state regulation that has become more stringent than federal requirements. *Id.* A report by the Academy for State and Local Government found that, while the federal role in intergovernmental relations has diminished as a result of deregulation and reduced federal aid, state and local authority continues to be preempted. *See* "Industries Try For Federal Regulation," Washington Post, Nov. 29, 1987. The result is a vacuum. The regulatory cat slowly fades, leaving behind a preemptive grin. *Cf. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988).

The politically sensitive nature of this conflict amply justifies this Court's refusal to find preemption in the absence of clear and manifest evidence that Congress so intended. The lower court acknowledged that it could find no definitive evidence of Congress' intent to preempt state tort law in either the language of the statute or the

legislative history. 789 F.2d 185-86. Amicus respectfully suggests that if the lower court had accorded the proper weight to this Court's presumption against preemption of traditional state tort remedies, it would have permitted plaintiff's action to go forward.

II. THE CIGARETTE LABELLING ACT DOES NOT PREEMPT STATE PRODUCT LIABILITY COMMON LAW CAUSES OF ACTION EXPRESSLY OR BY OCCUPYING THE FIELD.

The lower court correctly found that in § 1334 of the Act, Congress did not expressly preempt state tort law. Nor did Congress clearly intend to occupy the field so as to preclude state tort actions. 789 F.2d at 185-86. Every court which has considered this issue has reached the identical conclusion. *Pennington v. Vistron Corp.*, 876 F.2d 414, 418-21 (5th Cir. 1989); *Roysdon v. R.J. Reynolds*, 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625-26 (1st Cir. 1987); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239, 1247 (1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 658-60 (Minn. 1989).

The Act prohibits imposition of advertising requirements "under state law," clearly preempting state statutory and regulatory requirements. If Congress had wanted to bar common law tort actions as well, it could have done so explicitly, as it has in other statutes.[3]

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[3] *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. §301(a)(1982)(preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1)(1982)(preempting all state "law, decision, rules, regulations, or other State action having the effect of law").

Moreover, portions in the legislative history support the notion that Congress anticipated that product liability suits against cigarette manufacturers would continue under the Act. *See Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1162-63 (D.N.J. 1984)(quoting HEW Counsel Ellenbogen, referring to previous product liability suits against cigarette makers, and statements by Rep. Fascell, Rep. Watson, and others concerning the Act's effect on the chances of success of future plaintiffs).

Had Congress been silent with respect to preemption, it would have been appropriate for the lower court to search, as it did, for signs of implied intent. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987)("*Given that the Act itself does not speak directly to the issue*, the Court must be guided by the goals and policies of the Act in determining whether it in fact preempts [state law].")(emphasis added). In the Cigarette Labeling and Advertising Act, however, Congress was not silent. It included a section specifically entitled "Preemption" which did not include state tort actions.

Amicus suggests that this situation is more closely related to that addressed by Justice Marshall in *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Where Congress included two express preemption provisions in the Civil Rights Act, "there is no need to infer congressional intent to pre-empt state laws." *See also California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1430 (1987)(A clear expression of Congress' intent "will end our inquiry."); *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696 (Minn. App. 1988), *aff'd in part*,

437 N.W.2d 655 (Minn. 1989)("It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as in did in 15 U.S.C. §1334, expressly addressing what it intended to preempt.")

Amicus suggests that the lower court erred in seeking out implied intent in the face of Congress' express statement of preemption which did not included tort actions. Amicus further submits that the lower court further erred in finding implied preemption.

III. JURY AWARDS TO VICTIMS OF TORTIOUS CONDUCT DO NOT ACTUALLY CONFLICT WITH FEDERAL REGULATION.

A. The *Hines* Test Does Not Apply to State Tort Remedies.

The core of the Third Circuit's holding is

> the duties imposed though state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Hines*, 312 U.S. at 67, 61 S. Ct. at 404 . . ."

789 F.2d at 187.

The quoted passage from *Hines v. Davidowitz*, 312 U.S. 52 (1941), to a far greater extent than any other element in this Court's set of preemption standards, permits a court to interject its own policy judgments for those of Congress. For this reason, commentators have urged its abandonment. Note, *Common Law Claims Challenging Adequacy of*

Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc., 60 St. John's L. Rev. 754, 767 (1986).

This Court need not go so far, however. The context in which Justice Black announced this rule indicates that it was clearly intended to apply in areas of particularly federal concern. At issue was the validity of an Alien Registration Act adopted by the state of Pennsylvania:

> Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, *it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.* Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, *and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.*

312 U.S. at 67-68. (emphasis added)

This distinction was underscored recently in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court noted that *Hines* inferred a congressional intent to preempt state law based on the dominance of the federal interest in foreign

affairs. "Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern."
471 U.S. at 719.

On this basis, Amicus suggests, the Third Circuit erred in applying the *Hines* test to preempt a state tort remedy.

B. Jury Awards of Damages Under State Tort Law Do Not Conflict With Federal Regulatory Activities.

The most damaging and fundamental error in the lower court's decision is the notion that a jury damage award in a tort suit is, for preemption purposes, the equivalent of state regulatory action.

To be sure, there is some support for this view in this Court's opinion in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)

> Such regulation can be as effectively exerted through an award of damages as though some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

As this Court has recently clarified, *Garmon* sought to establish the remedial scheme provided by the National Labor Relations board in place of state remedies "by ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). As one district court concluded, *Garmon* is best understood as dealing with the primary jurisdiction of the NLRB and its remedial scheme.

Wood v. General Motors Corp., 673 F. Supp. 1108, 1118 n.14 (D. Mass. 1987), rev'd 865 F.2d 395 (1st Cir. 1988).

Again, this Court's *Silkwood* decision provided all the guidance the lower court needed. In that case, the Court held that federal law preempted state regulation of atomic power, but permitted jury awards for damage due to plutonium contamination.

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.
464 U.S. at 258.

Moreover, both dissenting opinions agreed with the majority that compensatory damages, at least, do not conflict with federal regulation. Justice Blackmun stated that "the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims." *Id.* at 263. Justice Powell's view was that, "[t]here is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault, as authorized by state law." *Id.* at 276 n.3.

This Court reaffirmed this distinction recently in another case involving nuclear safety:

> [F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect

on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

English v. General Electric Co., 110 S. Ct. 2270, 2278 (1990). *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988)(Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.); *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1554 (1987)("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." The Court concluded that tort law is not a state law which "regulates insurance.")

Any remaining notion that Congress viewed product liability awards as an obstacle to its purposes evaporated with the passage of a similar measure shortly after the first preemption decisions were rendered. As described by District Judge Mazzone,

> Persuasive evidence of Congress' belief that common law claims concerning the adequacy of warnings can exist side by side with federal uniform warning requirements can be found in the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 1986 U.S. Code Cong. & Admin.

> News (100 Stat.) 30, passed in February, 1986. This Act is very similar to the Cigarette Labeling Act. . . .
>
> Congress must have been acutely aware during the period the bill was pending --July, 1985 to February, 1986 -- of cases like *Cipollone* and *Roysdon* in which cigarette manufacturers were arguing that the federal cigarette labeling requirements preempted common law claims. It included in its preemption clause, a 'savings clause': "Nothing in the Act shall relieve any person from liability at common law or under State statutory law to any other person." Sec. 7(c). . . . It seems certain, therefore, that Congress believes that allowing products liability suits involving the adequacy of cigarette warnings will not frustrate its objective of uniform warnings.

Palmer v. Liggett Group, Inc., 633 F. Supp. 1171, 1179 (D. Mass. 1986)

Cigarette-related illness and death result in enormous costs in the form of medical expense and lost productivity. *See generally* Comment, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 Catholic U. L. Rev. 643, 645 (1987). The immunity conferred on the entire industry by the Third Circuit is extraordinary. Virtually no other industry, no matter how financially insecure, is as insulated from responsibility for the damage it causes. Virtually no other product is as bereft of social value that might justify such favored treatment. Amicus submits that, under the preemption principles this Court has set forth, the lower court was obligated to require far clearer and unmistakable evidence that Congress intended this result.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to reverse the order of the court of appeals.

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